Supreme Court of the United States.

OCTOBER TERM, 1873.

No. 127.

THE NASHVILLE & DECATUR RAILROAD COMPANY, Appellant,

vs.

JOHN C. ORR.

Appeal from the District Court of the United States for the District of Alabama.

BRIEF OF APPELLANT.

R. T. MERRICK,
Of Counsel for Appellant.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1873.

No. 127.

THE NASHVILLE & DECATUR RAILROAD COMPANY, Appellant,

vs.

JOHN C. ORR.

Appeal from the District Court of the United States for the District of Alabama.

BRIEF OF APPELLANT.

Abstract of Pleadings.

The proceedings in this case arose upon a bill filed by the appellee, John C. Orr, a citizen of Mississippi, against the county of Limestone, in the State of Alabama, and the appellant, "The Nashville and Decatur Railroad Company," both bodies corporate under and by virtue of the laws of the State of Alabama.

The bill sets forth, that in the year 1853, a railroad company, under the name of "The Tennessee and Alabama Central Railroad Company," was incorporated by the Legislature of Alabama for the purpose of constructing and operating a railroad located wholly or mainly within the limits of Limestone county, in that State, with the view of

connecting and ultimately of being consolidated with other railroads in the State of Tennessee; that in 1855, the Legislature of Alabama authorized the county of Limestone to subscribe to the stock of said company to the amount of $200,000, and in payment thereof to issue and deliver to the company the bonds of the county to that amount; that the county did thereupon issue and deliver such bonds; that in 1858 the company was authorized by the Legislature to negotiate and sell the said bonds, and was empowered, for the purpose of securing their redemption, to mortgage all its property and franchises; that on July 29, 1858, the company did accordingly execute such mortgage, and sold and assigned the said bonds to various persons, and, among others, the amount of $10,000 thereof to the complainant, Orr, (who was then, and for sometime afterwards, a director of the company;) that the complainant, at the time of the institution of the suit, remained the owner of about $6,500 of them, of which the principal remained unpaid, as well as the interest, from the respective dates of maturity; that in 1866 and 1867, "The Tennessee and Alabama Central Railroad Company" became consolidated with other railroad companies, and the consolidation became known as "The Nashville and Decatur Railroad Company," (the appellant in this cause,) and that the property and assets of the former company passed into the hands of the latter; that the complainant presented his bonds for payment to the proper authorities of Limestone county in 1866, and that payment was refused; and that the defendant, "The Nashville and Decatur Railroad Company," though fully aware of the default of the county, neglected and refused to provide for the payment of the bonds. The prayer of the bill is for an account, for a decree requiring the company to pay the amount that should be found to be due to the complainant, for the foreclosure of the mortgage and the sale of the mortgaged property.

The county of Limestone failed to appear to the suit, and a decree *pro confesso* was taken against it.

"The Nashville and Decatur Railroad Company" appeared, and, by agreement of counsel, in order to expedite the case, filed a demurrer, plea, and answer, and subsequently a second plea, and an amended answer in support of it.

The grounds of the demurrer were a want of proper parties and the absence of jurisdiction in the court.

The first plea set up that all the other bondholders, besides the complainant and one Pritchett, were residents of Alabama, and that the State court was the proper tribunal for the adjudication of the controversy.

The second plea, in connection with the amended answer, as matter in abatement, alleged an agreement entered into in April, 1868, between the various bondholders, the complainant among them, on the one side, and the Railroad Company on the other, whereby it was agreed that, before calling upon the Company to pay the bonds, all legal remedies against the principal debtor, the county of Limestone, should first be exhausted; that legal proceedings should forthwith be instituted against the county, and that the Company would contribute to the expense of them; that such proceedings were so instituted, and the company did contribute to the expense of them; that such proceedings were prosecuted to a final termination in the supreme court of the State; that, in pursuance of them, a mandamus was issued to the county authorities directing them to assess and collect a tax sufficient for the payment of all these outstanding bonds; and that, at the time of the institution of this suit and of such plea pleaded, the collector of the county was engaged in the collection of such tax.

The answer and amended answer, besides supporting these pleas, admitted the main facts of the bill, but denied any positive knowledge of the terms of the mortgage, and called for proof of it.

Testimony was taken on both sides, partly oral and partly documentary, and much of it was objected to.

The complainant, after examining several witnesses to ascertain where the original mortgage was, offered in evidence what purported to be a certified copy of it from the records of the probate court of Limestone county, and to this the defendant objected, but the objection was overruled. Further testimony was also taken, but it is not deemed necessary to state it here, as the issues raised by the various objections are not deemed material upon the present argument.

The testimony on behalf of the defendant was principally documentary, and included the record of the proceedings in the State courts against Limestone county, alleged to have been instituted in pursuance of an agreement between the complainant and the other bondholders and the defendant; and there is the deposition of Luke Pryor tending fully to prove this agreement, (p. 68, 69.)

At the hearing before the district court the defendant's demurrer and pleas were overruled, and the certified copy of the records of the probate court of Limestone county, purporting to be a record of the mortgage, was admitted in evidence. A decree was passed directing a reference to the master in chancery to state an account of the amount due to the complainant on account of the bonds in question; and, upon the coming in of the report, a final decree was entered ordering a foreclosure of the mortgage and a sale of the mortgaged premises, unless the railroad company should, within thirty days, pay to the complainant the amount found to be due him by the report.

Assignment of Errors.

1. The district court erred in admitting in evidence a certified copy of the alleged mortgage from the records of the probate court of Limestone county.

2. The district court erred in excluding the portion of the

testimony of Luke Pryor inclosed within black lines. (Record, p. 69.)

3. The district court erred in rendering its final decree solely against the defendant, "The Nashville and Decatur Railroad Company," whereas the same should have been rendered against Limestone county, also.

4. The district court erred in overruling the defendant's second plea, and allowing the complainant to maintain his suit, while the agreement was subsisting to exhaust legal remedies against Limestone county.

5. The Court erred in overruling demurrer to plea because only one mortgagee was made a party and no reason assigned for omitting the other mortgagees. - Brief. I.

1. In this case a mortgage is set up and attempted to be proved, but the original is not produced. There is, however, offered in evidence a certified copy of a record in the probate court of Limestone county, purporting to be the record of a mortgage from "The Tennessee and Alabama Central Railroad Company," but there is no proof to show that this is a record of the identical mortgage in controversy, or that only one mortgage was executed.

When relief is sought in cases of supposed lost instruments, as a guard upon the preliminary exercise of jurisdiction, an affidavit of the loss of the instrument and that it is not in the possession or power of the complainant, is indispensible to sustain the bill. But to maintain the suit, it is necessary, if the loss is not admitted by the answer of the defendant, that it should be established at the hearing by competent and satisfactory proof.

Hooe *vs.* Harrison, 11 Ala. R., 499, 504.

1 Story's Equity Jurisprudence, Sec. 88.

No such affidavit appears here, and its absence affords good ground for the demurrer interposed by the defendant.

What the "competent and satisfactory proof" is, which is required by the laws of Alabama to establish the instrument, will appear from the code of that State in force at the time of the execution of this mortgage. The provisions of the code are as follows:

"SEC. 1275. Conveyances of any property, whether absolute or on condition, which are proven according to law, and recorded within twelve months from their date, may be received in evidence in any court without further proof; and if it appears to the court that the original conveyance has been lost or destroyed, or that the party offering the transcript has not the custody or control thereof, the court must receive a transcript, duly certified, in the place of such original."

"SEC. 1282. All conveyances admitted to record on proof must be attested by two witnesses, and the proof or acknowledgment must comply substantially with the foregoing forms, or the conveyances lose the privileges conferred by section 1275."

Code of Alabama, 1852; secs. 1275, 1282.

Thus a transcript from the record is made competent evidence only in the case of the loss of the original, or when it appears that the party offering it has not the custody or control of the original; and this competency is subject to the provision that the original must appear to have been attested by two witnesses. No such attestation appears in this case, and consequently the transcript was inadmissible as evidence. Without this transcript, there is no sufficient proof of the mortgage, and therefore nothing for the court to act upon.

II.

There was no just ground for the exclusion by the district court of that portion of the testimony of Luke Pryor included within lines. (Record, p. 69.) That testimony was offered for the purpose of proving, in abatement of the suit,

an agreement entered into between the complainant with other bondholders and the railroad company to defer suit against the latter until legal remedies against Limestone county, the principal debtor, should be exhausted. That agreement, with the proceedings instituted in pursuance of it, was set up in the defendant's second plea as a bar to this suit. If the plea was a proper one, the testimony was certainly admissible in support it, and no valid reason can be assigned for its exclusion. If admissible, it is decisive of the truth of the plea, inasmuch as it is uncontradicted. It is true the district court overruled the plea, and the testimony was not, therefore, allowed to have any effect, whether admissible or not; but that the court erred in so overruling the plea it is believed will be apparent.

The testimony is direct and positive that the complainant had delivered his bonds to an attorney-in-fact to do with them as he should do with his own; and that thereupon this attorney-in-fact entered into the agreement in question. It is possible that, if the agreement had not been put in issue by the plea and answer, the testimony would not have been competent; but such issue having been raised, it seems unnecessary to recur to any authorities in support of the defendant's right to maintain it by such evidence as was offered.

III.

1. The county of Limestone was made a defendant to the bill, it is presumed, as the party primarily liable on the bonds. Now, if it was proper to make the county a party, and to take a decree *pro confesso* against it, and if the court properly acquired jurisdiction of the whole subject-matter of the controversy, it was necessary that the final decree should settle all the equities of the case; and its terms should have been that the mortgage should be foreclosed, unless the county of Limestone, or the railroad company, should pay

the amount due to the complainant. A decree against the railroad company alone was erroneous.

But it has been decided that a suit in equity to foreclose a mortgage does not lie against parties to a note or bond who are not parties to the mortgage as joint defendants.

Wilkerson *vs.* Daniels, 1 Iowa, 179.

IV.

It is proved in this case that before the institution of the suit that an agreement had been entered into between the railroad company, on the one hand, and the bondholders, including the complainant, on the other, that no attempt should be made to foreclose the mortgage, until all legal remedies against the principal debtor, the county of Limestone, were exhausted; and that proceedings should be instituted against the county at the joint expense. Such proceedings were instituted, and the railroad company contributed to the expense of them. There is no allegation or pretence that these proceedings would prove futile, or would fail to satisfy the claims of the bondholders.

The agreement was a covenant not to sue the surety for a limited time, until proceedings against the principal debtor proved unavailing; and the consideration of this agreement was the institution of legal proceedings against the county at the joint expense. It cannot be alleged that the consideration was void or insufficient.

Now, whether in a suit at law for the debt such a covenant not to sue until the happening of a certain contingency could or could not be set up in bar of the action, and the authorities do not seem entirely uniform on the subject, and whether the party protected by the agreement should not be compelled, if sued contrary to its provisions, to have recourse to his counter action on the covenant for damages—it can can scarcely be doubted that the violation of such an agreement is a breach of good faith not to be tolerated by a court

of equity. There must be conscience and good faith on the part of a complainant to call into action the powers of a court of equity.

McKnight *vs.* Taylor, 1 Howard, 161.
Pearl *vs.* Wells, 6 Wendell, 291.
Keating *vs.* Price, 1 Johnson's Cases, 22.
Fleming *vs.* Gilbert, 3 Johnson, 528.
Klopper's Ex'rs *vs.* Union Bank of Md., 7 H. & J., 92, 103.

That the agreement may have been merely verbal can make no difference, inasmuch as there is no suggestion to that effect, and the agreement became an executed contract on the part of the railroad company; neither is it any objection to it that it was made by attorney, inasmuch as the attorney's powers in the premises were wholly unlimited, and he was authorized to do with the complainant's bonds as he did with his own. Moreover the complainant subsequently sanctioned and ratified the agreement by joining in the suit against the county; and he should not now be permitted to go behind this agreement, when he cannot place the other parties to it in the same condition as before it, and he does not offer to reimburse the expenditure to which they have been put in pursuance of it.

R. T. MERRICK,
Of Counsel for Appellant.